No. 15451

In the United States Court of Appeals for the Ninth Circuit

KAY MARTIN SUMMERS, ALSO KNOWN AS KAY MARTIN AND KATHERINE SEAMON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

BRIEF FOR THE UNITED STATES

CHARLES K. RICE,
Assistant Attorney General.

JOSEPH M. HOWARD,
JOHN J. McGARVEY,
Attorneys,
Department of Justice,
Washington 25, D. C.

BEN PETERSON,
United States Attorney.

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OPINION BELOW

The judgment of the District Court was rendered without an opinion.

JURISDICTION

On September 6, 1956, a four count indictment was returned against the appellant in the United States District Court for the District of Idaho, charging, in the first three counts, wilful attempted evasion of income tax for the years 1950, 1951 and 1952, in violation of Section 145(b) of the Internal Revenue Code of 1939; the fourth count charged that appellant knowingly and wilfully made a false statement to Treasury agents in a matter within the jurisdiction of that Department, in violation of 18 U.S.C., Section 1001. (R.

6-9) [1] Jurisdiction was conferred on the District Court by 18 U.S.C., Section 3231. After a jury trial, appellant was found guilty as charged (R. 88.) She was sentenced to imprisonment for nine months and fined $1,000 on each count, the prison sentences to run concurrently. Sentence was imposed and judgment entered on November 21, 1956. (R. 89-90.) Notice of Appeal was filed on November 30, 1956. (R. 97-98.) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1291.

QUESTIONS PRESENTED

1. Whether appellant's conviction was obtained in violation of her rights under the Constitution to the effective assistance of counsel and due process of law as a result of the jeopardy assessment and tax liens.

2. Whether the court abused its discretion in denying in part appellant's motion for a bill of particulars as to the income tax evasion counts.

3. Whether the jury was properly impaneled.

4. Whether the court erred (a) in admitting subject to connection testimony and exhibits relating to appellant's net worth and expenditures without first requiring the prosecution to establish an opening net worth, and (b) in admitting the testimony of a Treasury agent as to the fact and negative results of an investigation conducted by the witness and other agents under his direction.

5. Whether the court unduly restricted cross examination of prosecution witnesses and made com-

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[1] References preceded by "R." are to the Transcript of Record; references preceded by "Tr." are to the Transcript of proceedings upon trial.

ments on the weight and importance of the evidence to the prejudice of appellant.

6. Whether such phrases in the instructions as "if you believe" and "it is sufficient" constituted plain error in the context used.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Constitution of the United States:

> Fifth Amendment
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
>
> Sixth Amendment
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U. S. C.:

SEC. 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statement or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749.

28 U. S. C.:

SEC. 1864. Manner of drawing; jury commissioners and their compensation.

The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing.

* * * * *

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for

and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145.)

SEC. 273. JEOPARDY ASSESSMENTS.

(a) *Authority for Making.* If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the Tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

* * * * *

(26 U.S.C. 1952 ed., Sec. 273.)

Federal Rules of Criminal Procedure:

RULE 30. INSTRUCTIONS.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such re-

quests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

RULE 52. HARMLESS ERROR AND PLAIN ERROR.

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

Appellant's statement of the case (Br. 2-18) is inadequate and incomplete in many respects. Accordingly, the Government submits the following summary of the evidence and record.

The first three counts of the indictment, charging wilful attempts to evade tax by the filing of false and fraudulent returns, alleged that appellant's reported and correct income and tax liability for the years in question were as follows (R. 8-9):

Year	Income		Tax Liability	
	Reported	Correct	Reported	Correct
1950	$2,585	$14,090	$92	$2,832
1951	2,248	12,997	44	2,772
1952	536	27,814	00	9,710

The fourth count charged that on or about July 22, 1953, appellant knowingly and willfully made a false statement of a material fact to agents of the Internal Revenue Service, "to wit, that the only currency that she had on hand at that time was $130.00, plus certain currency in her safety deposit box". (R. 8-9.)

On May 13, 1954, over two years prior to the return of the indictment, a jeopardy assessment was made and tax liens were filed against the appellant for income taxes and additions thereto for fraud, plus interest, for the years 1947 to 1952, inclusive. (R. 11, Tr. 577, Deft. Ex. 76.) The jeopardy assessment was made in accordance with the provisions of Section 273 of the Internal Revenue Code of 1939. On June 9, 1954, the Commissioner sent a notice of deficiency to appellant, setting forth the deficiencies and additions thereto for fraud for the years 1947 through 1952 totaling $80,603. (Deft. Ex. 76.) On June 25, 1954, appellant filed a petition with the Tax Court seeking a redetermination of the deficiencies [2] (R. 10-12.) Trial of the civil case was continued pending trial of these criminal charges.

PRE TRIAL MOTIONS

Appellant filed a motion for bill of particulars (R. 18-22), accompanied by her affidavit (R. 25-26) and an affidavit of one of her counsel, Walter N. Oros (R. 23-24), requesting the Government to disclose, with respect to the first three counts, the method used in determining the alleged unreported income and the source of such income and, if the net worth method was employed, the appellant's alleged net worth at the be-

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[2] The petition was prepared by the counsel who have represented appellant throughout these criminal proceedings.

ginning and end of each year involved, and with respect to count four, whether the alleged false statement was made orally or in writing, to whom made and where, and in what respects the statement was false. The court granted the motion in part as to the first three counts, ordering the Government to disclose the method to be employed in proving the alleged unreported income, and in full as to count four. (R. 29-39.) The Government filed a bill of particulars and supplement thereto (R. 31-32) in which it stated that the net worth method of proof would be employed, and that the false statement was made orally to two agents of the Internal Revenue Service, at the office of the Internal Revenue Service in Boise, Idaho.

On September 14, 1956, appellant moved the court for an order directing the Government to "release", in effect to pay over to her, at least $7,500 of her funds which, pursuant to the jeopardy assessment, had been levied upon by the Internal Revenue Service, applied against the assessment and covered into the Treasury, "in order that [appellant] may properly conduct her defense." (R. 10.) In an affidavit accompanying the motion (R. 11-12), appellant alleged in substance that as a result of the jeopardy assessment and accompanying tax liens and levies, she was without funds to pay "attorney's fees, accountant's fees, witness fees, and incidental expenses" in connection with the defense of this action. After a hearing, the court denied the motion without prejudice (R. 14, 28) on the grounds that it lacked jurisdiction to enter such an order (R. 52). On October 16, 1956,[3] appellant renewed the motion

[3] On September 26, 1956, appellant had filed a similar motion in the Tax Court which was denied on October 10, 1956. (R. 53.)

(R. 51.) which was accompanied by an affidavit of one of her counsel, Oros (R. 52-55), which recited, among other things, that "in order to sustain [appellant's] defense, it will be necessary that she have and employ the services of accountants," and that, as a result of the jeopardy assessment and accompanying liens and levies, she was without funds to secure such services. After hearing arguments of counsel, the court again denied the motion (R. 63) whereupon appellant, on the same day October 16, 1956, filed a motion to dismiss each count of the indictment (R. 65-66) and a motion for continuance (R. 70), trial having previously been set for October 22, 1956 (R. 14).

The motion to dismiss the indictment was based on the following grounds (R. 65):

> 1. That the Internal Revenue Code of 1939 and Amendments thereto, do not authorize the institution of a criminal proceeding during the pendency of a jeopardy assessment and liens.
>
> 2. That the institution of a criminal procedure as set out in the indictment in this case during the pendency of a jeopardy assessment and impending liens have deprived this defendant of liberty and property without due process of law, and in violation of the Constitution of the United States of America, and particularly in violation of the Fifth and Sixth Amendments to the Constitution.
>
> 3. That this defendant has been and will be unable to get a fair trial and will be deprived of the assistance of counsel and necessary witnesses for her defense because the jeopardy assessments and accompanying tax liens prevent her from using her

assets to insure adequate preparation for trial and representation at the trial.

Appellant filed an affidavit in support of the motions (R. 67-69) alleging, among other things, that, as a result of the jeopardy assessment and accompanying tax liens and levies, she was without funds to pay her attorneys, or to pay accountants to audit her records, "such as they are," or to enable her to summon witnesses, or to engage the service of expert accounting witnesses; and that "consequently she cannot safely go to trial."

In reply the Government filed an affidavit (R. 109-112) of an officer of the Internal Revenue Service, based upon the affiant's personal knowledge and records of the Internal Revenue Service, reciting that on November 10, 1953, appellant executed and filed with the Internal Revenue Service, a power of attorney authorizing Myron E. Anderson and Walter N. Oros, her present counsel, to represent her before the Treasury Department in all matters involving her income tax liability for the years 1938 through 1953; that the aforementioned attorneys have represented appellant in all hearings, formal and informal, before the Treasury Department and the Tax Court of the United States since the above date; that Myron E. Anderson had been an employee and officer of the Internal Revenue Service at Boise, Idaho, from 1933 until August 1953, holding, successively, the positions of Deputy Collector, Internal Revenue Agent, Assistant Chief Field Deputy, Chief, Income Tax Division, and Head, Income Tax Division; and that during his tenure with the Internal Revenue Service, Anderson had completed numerous courses in accounting and

income tax law, including courses in both basic accounting and the more complicated studies of corporate and analytical accounting, and that prior to his Government service, he had attended the University of Idaho where he majored in accounting.

On October 17, 1956, the court, after a hearing, denied the motions to dismiss the indictment and for continuance. (R. 71.) In so doing the court noted that appellant's counsel have been representing her in both the civil and criminal phases of the case since 1953, and that one of them, Anderson, had extensive accounting training and long experience in tax matters and was well qualified to protect her interests. The court also stated that if, in its opinion, it should become necessary in the course of the trial to appoint an accountant as an expert witness to insure appellant a fair trial, the court would take appropriate action at that time. In addition the court stated that in view of Anderson's qualifications, it would permit him both to testify as an expert witness for the defense and to participate in the trial as counsel.

Before the first witness was sworn at the trial, appellant moved to dismiss the entire jury panel on the grounds that "the jurors were not selected by chance." (Tr. 4, 8.) In support of the motion, appellant called as a witness the deputy clerk of the court, Paul Boyer, who had charge of the box from which the names of the prospective jurors were drawn. Boyer testified that the slips containing the names of prospective jurors had been placed, unfolded, in an open cigar box; that the slips were "mixed up" before they were drawn; and that although some of the slips were face up in the box and could be read, he did not look at

the names on the slips before they were drawn. Further, that all the slips were drawn from the box before the jury was selected. The only persons near the box were the clerk and deputy clerk of the court. (Tr. 4-8.) The motion was denied. (Tr. 8.)

SUMMARY OF THE EVIDENCE

The evidence to support the verdict may be summarized, briefly, as follows:

Appellant, now 49 years old, has been engaged in prostitution throughout her adult life, first in Ohio, and later in Michigan, Arizona, California, and Idaho. (Tr. 500-502, 500-507, 511, 519-520.) In 1934 she was convicted of pandering in Long Beach, California, and sentenced to imprisonment for one year. (Tr. 507-508.) Shortly after her release from prison in 1935, she went to Burley, Idaho. (Tr. 510.) From 1938 through 1952, she owned and operated a house of prostitution in Burley, Idaho, known as the Lee Rooms, except for relatively short periods during which she leased it. (Tr. 512-513, 519-520, 545.)

No tax return was filed by appellant for the years 1937 and 1938 (Tr. 24); her reported tax liability for the years 1939 through 1946, ranged from $7.60 for the year 1940 to $427 for the year 1946 (Pltf. Ex. 7); and for the years 1947, 1948 and 1949, she reported net income of $4,850, $3,186, and $5,502, respectively (Pltf. Exs. 4, 5, 6).

In 1940 appellant went to Alaska and while there had to borrow money. (Tr. 514-517.) She told a girl friend that she went to Alaska because "things were tough" and she "had to go up there to try and earn some money." (Tr. 596-597.) In August 1947, appel-

lant borrowed $586 from the Idaho Bank and Trust Company. In January 1950, she borrowed $10,000 from the same bank to pay for improvements to the Lee Rooms. (Tr. 41-43, 89-94, 549; Pltf. Exs. 15, 20, 32.) In the latter part of April 1952, appellant was arrested for selling liquor at the Lee Rooms without a state license (Tr. 528) and subsequently tried and convicted of this offense. (Tr. 159-162, 178-180, 197-201, 337). Appellant leased the Lee Rooms to a friend, Gloria Gordon, from July to November 1952. (Tr. 344, 354, 545.) A part of the Lee Rooms was damaged by fire in January 1952 (Tr. 44-45), but the fire did not interrupt its operation (Tr. 604-605).

The Lee Rooms consisted of 19 rooms, all of which were used for purposes of prostitution; there were no legitimate roomers or boarders. (Tr. 607.) During the prosecution years, appellant employed an average of three girls at the Lee Rooms for purposes of prostitution. Appellant received fifty percent of the girls' earnings. In addition the girls paid appellant $5 a day for room and board out of their share of the earnings. Appellant sold liquor at the Lee Rooms for fifty cents a drink. When drinks were ordered for the girls, they were served "B" drinks, a non alcoholic mixture of cola and water, for which the customers were charged the same price as for liquor. The girls did not share in the receipts from the sale of drinks. Tr. 206-211, 231-237, 243-247, 520, 523-527, 534, 600-611, 664.)

The prosecution called as witnesses four of the girls who had worked for appellant at the Lee Rooms during the prosecution years.[4] Three of the girls testified that

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[4] Carol Reeves (Tr. 206-211) worked for four months in early part of 1952; Delores Ganzan (Tr. 213-218) for three weeks in

after turning over one-half of their earnings from prostitution to appellant, the net to them ranged from $150 to $200 a week (Tr. 208, 215, 245), and one girl Elberta Downie, testified that she netted about $300 a week and on occasion as high as $500 a week. (Tr. 233). Downie also testified that during the period she worked at the Lee Rooms, a record of receipts from the sale of drinks was kept in a "shorthand tablet"; that she added the figures in the tablet for the housekeeper; and that "in the busier time" the liquor receipts totaled "a couple of hundred a week". (Tr. 236-238.)

During the prosecution years, appellant made frequent visits to the Idaho Bank and Trust Company, as often as twice a week, on which occasions she would exchange several hundred dollars or more in $1 and $5 bills for $50 and $100 bills; on at least one occasion she exchanged a thousand dollars in small bills for a $1,000 bill. Tr. 172-176, 228-229).

Appellant's tax returns for the years 1950, 1951 and 1952 were prepared by an accountant, Vern G. Hutchinson, from information furnished by her. Hutchinson who was called as a witness by the prosecution testified that he prepared the 1950 return from figures in a "little black book" submitted by appellant which purportedly contained a record of her receipts and expenditures from the operation of the Lee Rooms. One column in the little black book was captioned "room and board", and there were two or three other columns for expenses. There were no entries in the book reflecting receipts

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May 1952 (Tr. 329-330); Elberta Downie (Tr. 231-237) from July 1951 to January 1952; Lucille Marcelli (Tr. 243-247) from April to September 1950. Appellant admitted that the girls who testified were not the only girls who had worked for her during the period in question. (Tr. 610.)

from prostitution or from the sale of liquor. For the year 1951, the book had entries for only three months. In preparing the 1951 return, Hutchinson projected the figures for the three months over a year, that is, he multiplied the figures by four. In preparing the 1952 return, he used cancelled checks for expenses and "the income she gave me * * * on a piece of yellow paper." (Tr. 29-36.) The following schedule is a summary of the income reported by appellant in her returns for the years in question (Pltf. Exs. 1, 2, 3):

	1950	1951	1952
Lee Rooms			
Receipts:			
Room and board	$6,650.70	$6,368.00	$ 816.00
Room rent	763.00	1,212.00	–0–
Music box	370.50	448.00	154.50
Other sales	–0–	–0–	433.25
Rent (store)	1,200.00	1,200.00	–0–
Totals	$8,984.20	$9,228.00	1,403.75
Less: Deductions	6,466.32	7,062.26	1,825.53
Net profit (or loss)	$2,517.88	$2,165.74	($ 421.78)
Other Income			
Interest	17.47	17.81	155.23
Dividends	50.00	65.00	108.20
Rental income (net)*	–0–	–0–	1,729.19
Loss on operation of ranch	–0–	–0–	(1,033.95)
Total income reported	$2,585.35	$2,248.55	$ 536.89

* From lease of Lee Rooms and store.

The investigation of appellant's taxability began in May 1953. (Tr. 253.) On July 22, 1953, appellant was interviewed by Special Agent Tullis and Revenue Agent Olsen in the latters office in Burley. (Tr. 254-255.) At this interview, appellant told the agents that her records had been destroyed in a fire except for "some receipts and checks" for 1952 and a "little black book" in which she had some information relating to her 1951 return. Repeated requests by the agents to see the little black book were fruitless. The only records which appellant produced for the agents consisted of

some receipts and cancelled checks. (Tr. 255-256.) In the course of the interview, she was asked how much cash she had on hand in June 1950 when Agent Olsen had conducted an audit of her 1949 return, and how much cash she then had on hand. She replied that when Olsen conducted the prior audit she had "four or five thousand dollars" in cash, and that all the cash she then had was in her purse and in a safe deposit box at the Idaho Bank and Trust Company. At the request of the agents, she counted the cash in her purse which amounted to $130. Immediately after the interview, the agents, accompanied by appellant, inventoried the contents of her safe deposit box at the Idaho Bank and Trust Company. It contained, among other things, $4,000 in currency, consisting of thirty-six $100 bills and eight $50 bills. (Tr. 256-258.)

The agents again interviewed appellant on July 29, 1953 (Tr. 260-261), and on this occasion, she told the agents that "the largest amount of currency in her possession at any one time was $14,000, which she had at the time of her loan to Joe Peters" in June 1951,[5] and that "she had about this amount in 1949". (Tr. 267.)

At a third interview on September 1, 1953, she told the agents that "she always kept four or five thousand dollars in currency"; that "at the end of 1948 she had $14,000"; and that she had a like amount at the time of the Peters loan in June 1951. (Tr. 270-271.) Appellant then submitted a sworn statement that to the best of her knowledge and belief she "possessed in cash or currency not more than $15,000 and not less than $12,000" as of December 31, 1948. (Tr. 274; Pltf. Ex. 58).

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[5] Appellant had loaned Joe Peters the sum of $10,000 in June 1951, at which time Peters was the Mayor of Burley. (Tr. 193-195.)

Before signing the statement, appellant had consulted with her attorney and Agent Tullis had explained the purpose of the statement both to her and to the attorney. (Tr. 271-272.)

At the trial, Gloria Gordon testified that in August 1953, she observed appellant counting a large sum of money, consisting mostly of $50 and $100 bills, in the bedroom of the latter's ranch home; that after the money had been counted, appellant said it totaled $46,000 and that "she had saved for a lifetime to save that $46,000". (Tr. 344-345, 347.)

In February 1954, appellant reported the theft of some $46,000 in cash to the Sheriff's office in Boise (Tr. 354-359) and to the local office of the Federal Bureau of Investigation (Tr. 339-342.) She told the Sheriff's office that the money represented "twenty years earnings." (Tr. 359.) Shortly thereafter a suspect was arrested. When appellant was called to testify as the complaining witness at the suspect's preliminary hearing in March 1954, she declined to answer questions relating to the theft on the grounds that her answers might tend to incriminate her,[6] adding, at one point, "[f]urthermore, an Internal Revenue Agent is sitting here now", the reference being to Special Agent Tullis. (Tr. 362-367.)

In the course of the investigation, appellant also told the agents that she did not owe any debts, with the exception of the mortgage on her ranch (Tr. 258); that she never received any gifts or inheritances, except a watch (Tr. 266-267); and that she did not share in the girls' earnings from prostitution, stating that "the

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[6] Appellant was represented at this hearing by her present counsel. (Tr. 364.)

only source of income pertaining to the Lee Rooms * * * was the board and room for the girls'' (Tr. 314-315).

At the trial, the Government's case was based upon the net worth method of proof. Appellant was credited with an opening net worth of some $62,000, including an item of undeposited cash on hand in the amount of $15,000. The evidence revealed that during the prosecution years her net worth increased, largely through cash expenditures, from $62,000 to $106,000, without taking into account any increase in undeposited cash on hand;[7] and that based upon the increases in net worth plus nondeductible expenditures, her true net income for the years 1950, 1951 and 1952 was $12,574, $12,671, and $20,739, respectively, whereas she reported income of $2,585, $2,248 and $536, respectively, and that her correct tax liability for the same years was $2,654, $3,035, and $7,490, respectively, whereas she reported a tax liability for 1950 and 1951 of $92, and $65.73, respectively, and no tax due for 1952. (Tr. 375-429; Pltf. Ex. 66, 67.) The Government's net worth summary (Pltf. Ex. 66) and computation of tax liability based thereon (Pltf. Ex. 67) are reproduced in the Appendix.

The assets, liabilities and expenditures included in the net worth statement were established by third party testimony and records and were not disputed by appellant, with the exception of the item of cash on hand. The proscution called some 50 witnesses to identify docu-

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[7] Although the evidence clearly indicated that the amount of appellant's undeposited cash on hand increased substantially during the prosecution years, the Government took the position most favorable to appellant and did not increase this item in any year. (Tr. 385-389, 395, 401, 406-407).

ments and testify concerning transactions with appellant during the years covered by the indictment, and it offered in evidence more than 40 exhibits (including those set out in appellant's brief at p. 10) relating to items in the net worth summary. The prosecution concluded its case in chief with the testimony of Revenue Agent Finley who summarized the net worth evidence and made the tax computation. (Tr. 371-429.) With few exceptions, appellant objected to the testimony and exhibits relating to items comprising her net worth and expenditures on the grounds that "no *corpus delicti*" had been established. (Tr. 38, 40, 41, 43, 47, 50, 58, 62-63, 66, 68-69, 74, 96, 101, 103, 105, 108-110, 129, 131, 134, 142, 144, 149, 151-152, 154, 157, 164-165, 167, 179-180, 183, 190, 194, 198, 201, 203-204, 222-224, 231, 275, 348, 353, 382, 427, 429-431.) In overruling the objections, the court repeatedly stated that it would admit the evidence subject to connection and that if the evidence was not related and shown to be material, it would entertain a motion to strike. (Tr. 38-39, 50, 53, 58-60, 204, 231.)

At the close of the Government's case, appellant moved to strike all the testimony and exhibits admitted over her objection and for judgment of acquittal. She also renewed her motion to dismiss the indictment on constitutional grounds. (Tr. 496-499.) The motions were denied. (Tr. 499.)

The defense was a belated story of a cash hoard on hand at the beginning of the prosecution period sufficient to account not only for the bulge in appellant's net worth during the prosecution years but in addition for the $46,000 which she reported as stolen in February 1954. Appellant took the stand and made claim to a cash hoard of some $118,000 as of the end of 1949.

(Tr. 582.) Her testimony, in substance, was that she received a gift of more than $100,000 in 1932 from a Chinese admirer and a payment of $10,000 in 1935 from an associate in prostitution, identified as Walter Taylor; that she retained these sums substantially intact down through the years, keeping the money at first in a suitcase, then later in a trunk and finally, beginning sometime in 1946, in a wall safe which she had installed in the Lee Rooms; and that the cash hoard thus acquired and retained, and not her receipts from prostitution and the sale of liquor at the Lee Rooms which she claimed were fully reported in her returns under receipts from "room and board" and "room rent" (Tr. 546-547), accounted for the increases in her net worth during the prosecution years. (Tr. 501-514, 518-519, 521-523, 590-591.)

Appellant gave the following account of the alleged gift from a Chinese admirer: She testified that in 1932 she was working as a prostitute at the Lilly Rooms in Stockton, California; that the Lilly Rooms were located within a block or two of the Oriental district and had as one of its customers a "prominent" and "wealthy" Chinese named Lee Chong, who operated a herb and importing business under his own name at 104-106 Franklin Street, a distance of about a half block from the Lilly Rooms; that Lee Chong took a liking to her and proposed marriage and a life in China; that she accepted; and that to bind the bargain Lee Chong gave her a total of $113,000 on three occasions in 1932. The gifts, allegedly, were made in Lee Chong's living quarters in the rear of his business establishment. Appellant was quite definite in her testimony that Lee Chong's business establishment was located at 104-106

Franklin Street. (Tr. 660-661.) She testified further that after receiving the gifts, she "thought better" of the bargain and decided against marriage to Chong and a life in China but that Chong was not advised of her change of heart; that she left Stockton carrying Lee Chong's $113,000 "in a suitcase packed amongst [her] clothes"; that she carried the money about with her in the suitcase while she plied her trade in Oakland, Los Angeles and Long Beach; that after her arrest in Long Beach, she was released on bail and made a trip to Stockton where she stored the money in a trunk at the Lilly Rooms; and that after her release from prison in 1935, she returned to Stockton, picked up the money and shortly thereafter went on to Burley, Idaho, where she kept the money at first in her suitcase, then later in the trunk which she had sent on from Stockton, and finally in the wall safe in the Lee Rooms. Further, that she named her establishment in Burley the Lee Rooms after her Chinese benefactor. (Tr. 501-661.)

On cross examination, appellant admitted she made a false statement to the investigating agents on July 22, 1953, as charged in count four of the indictment, in that she told the agents all the cash which she had at the time was the $130 in her purse and the $4,000 in the safe deposit box at the Idaho Bank and Trust Company. (Tr. 617-619.) She also admitted that when she gave the sworn statement to the agents on September 1, 1953, she knew it was false. (Tr. 616-617.) Her explanation of this conduct was that she did not understand the questions asked by the agents (Tr. 557-559, 621), adding (Tr. 558) "[i]f they had explained it, I think I would have perhaps told them what they wanted to know [the source and amount of cash on hand], but I thought

that they were prying into my business and I didn't want to tell them."

In rebuttal the prosecution offered in evidence tending to establish that appellant's claim of a cash hoard acquired by gift from a Lee Chong was a fabrication. Appellant had recounted the story of the alleged gift from Lee Chong for the first time at a conference in May 1955 in the office of the Regional Counsel, Internal Revenue Service. (Tr. 562, 586-591, 715.) However, the address in Stockton of the alleged Lee Chong was not disclosed by appellant until she took the stand at the trial. (Tr. 718-719.) Special Agent Stark testified, over defense objections, that subsequent to the conference in May 1955, an investigation was conducted by the Service in an effort to locate a Lee Chong who had been in the herb and importing business in Stockton at the time fixed by appellant; that the investigation was conducted in Stockton, Sacramento, San Francisco and Los Angeles, California, and surrounding areas; that all reports of the investigation were submitted to him; and that no Lee Chong fitting the description given by appellant was located. (Tr. 711-717.) Further, that an investigation was also made in an effort to locate Walter Taylor who allegedly gave appellant $10,000 in 1935. Although it was determined that a Walter Taylor fitting the background furnished by appellant died in Phoenix, Arizona, in 1946, this investigation was otherwise inconclusive. (Tr. 717.) The purpose of Stark's testimony was to establish that the Government had discharged its obligation to investigate leads furnished by the taxpayer and reasonably susceptible of being checked. (Tr. 714.) The defense objected to the evidence on the grounds of hearsay. (Tr. 712-714, 717.)

Special Agent Rogers then testified that following appellant's testimony at the trial, in which she gave Lee Chong's address in Stockton (in 1932) as 104-106 Franklin Street, he conducted a further investigation which disclosed that there was no Franklin Street in Stockton prior to 1946 when a street in a new development some four miles from the area fixed by appellant was given that name. In addition, the prosecution placed in evidence a City Directory of Stockton for the years 1931 and 1932. The City Directory did not list any Lee Chong or Chong Lee. (Tr. 719-729; Pltf. Ex. 81, 83.)

At the close of the evidence, appellant renewed all motions previously made, including her motions for judgment of acquittal and to dismiss the indictment on constitutional grounds. The motions were denied. (Tr. 739-740).

At the completion of the charge (Tr. 740-758), the court excused the jury to entertain exceptions; none was taken. (Tr. 758.)

Following the verdict of guilty as charged (R. 88), appellant filed a motion for acquittal on the ground that the evidence was insufficient to sustain the verdict (R. 83-84); a motion for arrest of judgment on the grounds that the court lacked jurisdiction to try appellant while a jeopardy assessment and tax liens were outstanding against her and that she had been denied due process of law (R. 85); and a motion for new trial on sundry grounds, none of which challenged the instructions to the jury (R. 85-87). The motions were denied.

ARGUMENT

I

Appellant Was Not Deprived of Her Rights to the Effective Assistance of Counsel and Due Process of Law as a Consequence of the Jeopardy Assessment

Appellant contends (Br. 37-50) that a result of the jeopardy assessment and accompanying tax liens, her conviction was obtained in violation of her rights to the effective assistance of counsel and due process of law as guaranteed by the Sixth and Fifth Amendments to the Constitution. No claim is made that appellant was tried without benefit of counsel, and throughout the course of these proceedings she has been ably represented by two competent attorneys of her own choosing. The gist of appellant's contention is that in a prosecution for tax evasion based upon net worth proof, the services of an accountant are essential to the enjoyment by a defendant of the right to the effective assistance of counsel and due process of law. This being so, she argues that she was deprived of her right to the effective assistance of counsel because, as a result of the jeopardy assessment and tax liens, she was without funds to engage the services of an accountant to aid her counsel in the preparation and presentation of her defense.[8] Accordingly, she asks this Court to reverse

[8] Appellant also argues that the jeopardy assessment and tax liens left her without funds to pay her attorneys and to summon witnesses and pay their fees. However, we doubt that appellant seriously urges upon this Court that her constitutional rights were violated in that the jeopardy assessment left her without funds to adequately compensate her attorneys or to summon witnesses and pay their fees. Assuredly, we are not here concerned with the compensation of appellant's attorneys, and, as her counsel well know (Br. 41), Rule 17(b) of the Federal Rules of Criminal Procedure provides for the payment by the Government of the fees of necessary defense witnesses where the defendant is without funds.

the judgment of conviction and to grant her motion to dismiss the indictment. The argument is without merit.

In the first place, even assuming, *arguendo,* the validity of appellant's premise that in a prosecution for tax evasion based upon net worth proof the services of an accountant are essential to the effective assistance of counsel and due process of law as guaranteed by the Constitution, and we submit that this premise is without support in law, the fact of the matter is that both prior to and during trial, appellant had the services of an expert accountant. The record shows that one of her counsel, Anderson, is a well qualified accountant as well as an attorney with some twenty years experience in the Internal Revenue Servic. It would indeed be difficult to find a more qualified accounting expert. Moreover, Anderson, as well as co-counsel Ores, have represented appellant in both the civil and criminal aspects of her tax liability since at least November 1953, a period of almost three years prior to the trial. Appellant's assertion (Br. 39) that if Anderson had been called to testify as an expert witness for the defense, "he would have then been thereafter precluded from participating in or arguing the cause for the defendant" ignores the facts of record. In the course of argument on appellant's motion to dismiss the indictment on constitutional grounds, the court stated that in view of Anderson's qualifications, it would permit him both to testify as an expert witness for the defense and to participate in the trial as counsel. In short, appellant's claim that she lacked the services of an expert accountant to assist her in the preparation and presentation of her defense is without warrant in the record.

Furthermore, appellant's defense did not involve any "complex accounting problems", nor were any posed by the prosecution's evidence. In fact the only item in the net worth computation disputed by appellant was the item of undeposited cash on hand. Her defense was that the increases in her net worth were attributable to a cash hoard which the Government failed to credit. In what respect the jeopardy assessment hindered the presentation of this defense is left to conjecture. In point here is *O'Connor* v. *United States,* 203 F. 2d 301 (C. A. 4th), in which case the Court of Appeals for the Fourth Circuit rejected an argument similar to that advanced here by appellant. In the *O'Connor* case, the indictment charging tax evasion based upon net worth proof was returned in May 1950; a jeopardy assessment was levied against the defendant and his assets and current income were subjected to liens and levies in August, 1952; and in October 1952, he was brought to trial and convicted. On appeal the defendant contended that he was deprived of a fair trial because of the jeopardy assessment and accompanying liens and levies. In rejecting this contention, the court observed that (p. 303):

> But the present contention was not raised until the first day of the trial in the District Court and no offer was then or later made during the trial, nor has any offer been made in this court upon this appeal, to show that the defendant was embarrassed by the assessment in the preparation or trial of the case, or that he would or could have made any other defense than he did present, if the assessment had not been levied. As a matter of fact his own accountant was called as a government witness

> and he was free to bring out in cross examination any facts relative to his record that would be helpful to his case. He has been represented throughout by competent counsel skilled in matters pertaining to federal income taxes. There is no claim that the minds of the jury were in any way affected by the levying of the assessment. In effect, the present contention is that the mere levying of a jeopardy assessment against the property of a taxpayer is of itself sufficient to preclude the trial of an indictment against him upon charges of defrauding the United States. We do not think that the bringing of an indictment strips the government of the power to proceed under the provisions of Section 273 of the Internal Revenue Code, 26 U.S.C.A. § 273, by way of jeopardy assessment to restrain a delinquent taxpayer from the disposition of his property, or that the mere levying of such an assessment precludes the prosecution of such an indictment.

Here, as in the *O'Connor* case, there has been no showing by appellant that she was in fact embarrassed in the preparation and presentation of her defense by the jeopardy assessment.

Secondly, the novel proposition here urged by appellant—that in a prosecution for tax evasion based upon net worth proof, the services of an accountant, a lay expert, are essential to the enjoyment by a defendant of his rights to the effective assistance of counsel and due process of law—is without support in authority.

The Supreme Court has ruled that the criminal sanctions provided by Congress in the revenue laws are to be "enforced by the criminal process in the familiar

manner" (*Spies* v. *United States,* 317 U. S. 492, 495), and that "the settled standards of the criminal law are applicable to net worth cases just as to prosecutions for other crimes," (*Holland* v. *United States,* 348 U. S. 121, 138). Accordingly, there is no basis in law for regarding criminal tax cases in general or net worth prosecutions in particular as unique and *sui generis.*[9]

Under "the settled standards of the criminal law", a defendant's right to the effective assistance of counsel, guaranteed by the Sixth Amendment, has always been understood to mean the assistance of *legal* counsel and the cases cited by appellant deal with the right to the effective assistance of *legal counsel.* None of the cases cited is authority for holding that the services of lay experts, in this case accountants, are essential to the enjoyment of that right. Nor is it a requirement of due process of law under the Fifth Amendment that a defendant have the services of a lay expert. At least the Supreme Court declined to read such a requirement into the due process clause of the Fourteenth Amendment in a case involving a capital offense and the death penalty. *Smith* v. *Baldi,* 344 U. S. 561, 568, affirming, 192 F. 2d 540 (C. A. 3d).

In support of the novel proposition advanced here, appellant points (Br. 37-38) to the observations of the Supreme Court in *Holland* v. *United States,* 348 U. S. 121, 129, that there are "pitfalls inherent in the net worth method", which "require the exercise of great care and restraint" by the trial courts. Appellant

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[9] Appellant seeks to distinguish this case on the ground that claims of the Government which prosecuted her rather than the claims of other creditors rendered her insolvent. The distinction sought to be drawn is without validity. See *United States* v. *Brodson,* 241 F.2d 107 (C.A. 7), petition for certiorari pending.

claims (Br. 37-39) that the pitfalls inherent in the method, which she does not pause to analyze, can be avoided if accountants are available to the defense. In appellant's words (Br. 38-39) the pitfalls "can be avoided only if they can be tested beforehand * * * and this testing not only requires substantial preparation, accounting and otherwise, but demands defense trial assistance from persons skilled in the art of accounting." In other words, the pitfalls which concerned the Supreme Court in the *Holland* case are not legal pitfalls but rather matters within the province of those skilled in the art of accounting. It is submitted that the *Holland* case does not support any such proposition. It is clear from the Court's opinion in the *Holland* case, *supra,* pp. 124-125, that it was there concerned with the impact of the use of the net worth technique, and the assumptions upon which it is based, on "the safeguards traditionally provided in the administration of criminal justice." Such matters are not the concern of accountants. At no point in its opinion does the Court indicate that the "dangers" which inhere in the method can be avoided or minimized by those skilled in the art of accounting.

The argument that accounting services are indispensable to the defense of a net worth prosecution is based upon a misconception of the net worth technique. The net worth method does not involve technical accounting concepts. As was observed by the Supreme Court in the *Holland* case, *supra,* 131, the net worth technique "is not a method of accounting at all, except insofar as it calls upon taxpayers to account for their unexplained income." It consists, essentially, of the marshalling of a taxpayer's assets, liabilities, nonde-

ductible expenditures and non-income items for the period under review. These are matters within the peculiar knowledge of the taxpayer. However, the Government, in order to ascertain these facts frequently is obliged, as here, to conduct a long and painstaking investigation into third party records, public records, and other sources. It is apparent that to do so the Government must rely on agents trained in the fundamentals of accounting and investigative techniques. But a net worth statement compiled by the agents is, primarily, the end product of investigative techniques. It is not an accountant's work of art.

Appellant's reliance (Br. 46-49) upon the opinion of the District Court in *United States* v. *Brodson*,[10] is misplaced. In the *Brodson* case, the defendant was indicted for tax evasion while a jeopardy assessment and tax liens were outstanding against him. The allegations of the indictment were based upon net worth proof. The defendant filed a preliminary motion to dismiss the indictment on the same grounds urged here by appellant. In support of the motion he filed affidavits which were controverted by the Government to the effect that he was indigent and without funds to employ an accountant as a result of the jeopardy assessment and tax liens, and his court appointed counsel filed an affidavit expressing the opinion that the services of accountants were essential to his defense. In this posture of the case, the District Court dismissed the indictment, holding that in a prosecution for tax evasion based upon net worth proof, the services of an accountant were essential as a matter of law to the

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[10] 136 F. Supp. 158 (E.D. Wis.), reversed, 241 F. 2d 107 (C.A. 7th), petition for certiorari pending.

effective assistance of counsel and due process as guaranteed by the Sixth and Fifth Amendments to the Constitution; that as a result of the pending jeopardy assessment and tax liens, the defendant was unable to obtain such services; and that, accordingly, defendant's constitutional rights would be violated if he were brought to trial. An appeal was taken by the Government to the Court of Appeals for the Seventh Circuit and the judgment of the District Court was reversed, one judge dissenting, and the indictment reinstated. On rehearing *en banc,* the court, two judges dissenting, adhered to the decision of the panel.[11] The Court of Appeals held that the judgment of the District Court was premature and without precedent and that a proper determination of the question presented by the motion to dismiss could be made only after a trial. It is therefore apparent that the *Brodson* case is not authority for the proposition here urged by appellant. But see, *United States* v. *Allied Stevedoring Corp.,* 138 F. Supp. 555 (S.D. N.Y.)

The novel proposition here urged by appellant has far reaching implications. If it can be said that the services of an accountant are essential to the enjoyment by a defendant of his right to the effective assistance of counsel and due process in a tax evasion case, then all defendants in criminal cases would be entitled to lay experts in addition to legal counsel. As was observed by a majority of the Court of Appeals in the *Brodson* case (241 F. 2d 107, 110):

> Such a policy, if now established, would as a matter of consistency be subject to extension to experts

[11] The opinion of the panel which was entered on October 31, 1956, is not yet officially reported. See 1956 P-H par. 73,017.

in other fields—psychiatrists, ballistics experts, chemists, physicians, and an unlimited unmber of other specially trained persons. It is this natural consequence of such a policy which, in addition to the reasons above stated, dictates that, if established, it must be based upon a record containing the actual proceedings at a trial, rather than the inferences drawn from pretrial affidavits.

Another consequence would be to put the Government to a choice of remedies in the enforcement of the revenue laws against taxpayers who fail to render a true account. Congress has imposed both civil and criminal sanctions in order to enforce the revenue laws, and the Supreme Court has clearly indicated that Congress did not intend that the Government should be put to a choice of the remedies. It has repeatedly held that the imposition of one form of sanction does not preclude resort to the other. *Spies* v. *United States,* 317 U. S. 492; *Helvering* v. *Mitchell,* 303 U. S. 391. The levying of a jeopardy assessment, provided for in Section 273 (a) of the Internal Revenue Code of 1939, *supra,* is a civil sanction designed by Congress to protect the revenue and to render more effective the tax collecting system.[12] But under appellant's theory, if the Government sought to protect the revenue and invoked the civil sanction of a jeopardy assessment, it would in effect be precluded from initiating a criminal prosecution. It is apparent that such a result was never in-

[12] The statute does not violate due process since it affects only property rights and adequate provision is made for ultimate judicial determination of the liability. See *Phillips* v. *Commissioner,* 283 U. S. 589; *Dyer* v. *Gallagher,* 203 F. 2d 477 (C.A. 6th); *Harvey* v. *Early,* 66 F. Supp. 761 (W.D. Va.), affirmed, 160 F. 2d 836 (C.A. 4th).

tended by Congress in enacting the civil and criminal sanctions it deemed necessary to protect the revenue, and it is respectfully submitted that such a result is not required by Constitutional guarantees. See *O'Connor* v. *United States,* 203 F. 2d 301, 303 (C.A. 4th).

The record in this case shows that throughout the course of this proceeding, and prior thereto, appellant has been represented by two competent counsel, one of whom is also an expert accountant. It is submitted that appellant's contention that her conviction was obtained in violation of her rights under the constitution is without merit.

The foregoing discussion relates only to the counts charging income tax evasion based upon net worth proof. In addition, appellant stands convicted of having made a false statement in violation of 18 U.S.C., Section 1001 for which she received a concurrent sentence. As we understand her argument, that conviction stands unchallenged.

II

The Trial Court Did Not Abuse Its Discretion in Denying, in Part, Appellant's Motion for a Bill of Particulars

Appellant's contention (Br. 50-54) that the court abused its discretion in denying, in part, her motion for a bill of particulars as to the income tax evasion counts is without merit. Her complaint is that the Government should have been required to disclose, in addition to the fact that it was proceeding under the net worth method, the details of the net worth computation and the source or sources of the alleged unreported income. The answer is that this Court and other Courts of Appeals have repeatedly held, under similar circum-

stances, that the most a defendant is entitled to is a disclosure of the theory of the prosecution's case. That appellant was given. *Remmer* v. *United States,* 205 F. 2d 277, 281-282 (C.A. 9th); judgment vacated and remanded on other grounds, 347 U. S. 227, reaffirmed, 222 F. 2d 720, reversed on other grounds, 350 U. S. 377; *Blackwell* v. *United States* (C. A. 8th), decided May 5, 1957 (1957 CCH Par. 9644); *United States* v. *Caserta,* 199 F. 2d 905, 910 (C. A. 3d); *United States* v. *Chapman,* 168 F. 2d 997, 999 (C. A. 7th).

Furthermore, the record clearly shows that the particulars requested were known to appellant who had in fact recounted to the agents in the course of the investigation the details of the financial transactions reflected in the net worth summary. (Tr. 254-269, 281-287.) She did not allege surprise at the trial by the nature of the evidence, nor has she made any effort here or in the court below to show that her defense was in any way prejudiced by the denial of the requested particulars. Since the granting or denial of the bill was within the sound discretion of the trial court and no abuse or prejudice appears, its ruling on the application should not be disturbed on appeal. *Wong Tai* v. *United States,* 273 U. S. 77, 82, *Maxfield* v. *United States,* 152 F. 2d. 593, 596 (C. A. 9th), certiorari denied, 327 U. S. 794; *Remmer* v. *United States, supra.*

III

Appellant Was Not Prejudiced by the Manner in Which the Jury Was Selected

Appellant contends (Br. 55-56) that the jury "was not selected by chance" in that the slips bearing the names of prospective jurors were not "folded" and placed in a "sealed" box as provided by the laws of the

State of Idaho, and that, accordingly, her motion to dismiss the panel should have been granted. There is no substance to this. In the first place the laws of the State of Idaho relating to the manner in which jurors shall be selected are not controlling here. As was observed by the Supreme Court in *Pointer* v. *United States,* 151 U. S. 396, 407-408, "the mode of designating and empaneling jurors * * * in the courts of the United States is within the control of those courts, subject only to the restrictions Congress has prescribed, and, also, to such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries."

The applicable statute, 28 U.S.C., Section 1864, provides in pertinent part that "the names of * * * petit jurors shall be publicly drawn from a box". That procedure was observed here. And, contrary to appellant's assertion (Br. 56), the slips were shuffled before the drawing (Tr. 6); the names were not read by the Clerk before they were drawn from the box (Tr. 8); and no one else was in a position to observe the names on the slips (Tr. 6). Moreover, all the names in the box were drawn before the panel was selected. (Tr. 7.) In short, appellant, upon whom the burden rested (*Frazier* v. *United States,* 335 U. S. 497, 503), failed to show any irregularity in the selection of the jury, although given full opportunity by the court on a *voir dire.*

IV

The Court Did Not Err in Ruling on the Admissibility of Evidence

Appellant contends that the court committed prejudicial error in admitting over her objection (a) testi-

mony and exhibits relating to her net worth and expenditures without first requiring the Government to establish an opening net worth, and (b) rebuttal testimony of a Treasury agent as to the fact and results of an investigation conducted by the witness and other agents under his direction.

(a) Throughout the prosecution's case, appellant objected to the admissibility of testimony and exhibits relating to her net worth and expenditures during the prosecution years on the grounds that "no *corpus delecti* had been established "and no opening net worth proved at the time the evidence was offered. (See e. g. Tr. 38, 40, 41, 43, 50, 58-60.) Insofar as the objection was based on the ground that no *corpus delecti* had been established, the short answer is that in the crime of tax evasion there is no *corpus delecti* as such. *Smith* v. *United States,* 348 U. S. 147, 154. With respect to opening net worth, obviously it cannot be established in one fell swope as the court below pointed out in admitting the evidence subject to connection. (Tr. 39, 53.) Actually, appellant does not challenge (Br. 56-58) the competency, relevancy or materiality of the evidence but rather the order in which it was presented, a matter within the discretion of the court and one not infrequently dictated by circumstances. The jury could hardly have been led astray and the appellant prejudiced by the order in which the evidence was presented for the significance of the evidence was made crystal clear in the course of the testimony of the Government's expert who was called, at the conclusion of the prosecution's case, to summarize the net worth evidence and compute the tax allegedly evaded. Since all of the evidence objected to by appellant was connected up

by the prosecution, the court properly denied her motion to strike.

(b) Appellant contends (Br. 62-64) that her objection to the testimony of Special Agent Stark as hearsay should have been sustained, and that the admission of the testimony was improper and prejudicial. Stark was the agent in charge of the investigation which had been conducted in an effort to locate a Lee Chong and Walter Taylor, following appellant's appearance at a conference in the Treasury Department where she related for the first time the story of the cash hoard acquired by gift. The reports of other agents cooperating in the investigation were submitted to Stark. The stated purpose of Stark's testimony was to establish the fact that an investigation of the "leads" furnished by appellant had been made and that the Government had discharged its obligation in this respect. (Tr. 712-714.) Having been in charge of the investigation, Stark was certainly competent to testify from personal knowledge that one had been made. And even assuming, *arguendo,* that his testimony as to the negative results of the investigation was, in part, hearsay, this fact was established by other competent and unquestioned evidence, with the result that the error, if any, was harmless. It was the rebuttal testimony of Special Agent Rogers and the exhibits introduced in the course of his testimony which exploded the incredible tale of Lee Chong and the $113,000 gift, if the jury had entertained any lingering doubts after appellant's testimony. Furthermore, it is not without significance that appellant's counsel passed cross examination of Stark. (Tr. 718.)

V

The Court Did Not Restrict the Cross Examination of Prosecution Witnesses Nor Did It Comment on the Importance and Weight of the Evidence to the Prejudice of Appellant

The assertion by appellant (Br. 58-60) that the court abused its discretion by unduly restricting cross examination of prosecution witnesses, specifically, the investigating agents, is without warrant in the record. The fact of the matter is that cross examination of the agents was not restricted, unduly or otherwise. The record shows (Tr. 119, 240, 308-309, 437, 441-443, 451-452, 566, 592) that the court, if anything, was extremely liberal allowing defense counsel "free rein" on numerous occasions. Moreover, the court, at appellant's request, suspended its rules to permit *both* of her counsel to cross examine the Government's expert. (Tr. 431-493).

Nor did the court, as appellant asserts (Br. 60-62) comment to her prejudice on the weight and importance of the evidence. Here too, the record belies the claim for at no point in the trial did the court comment on the importance of the evidence. And it was careful to instruct the jury early in the trial (Tr. 112) that "you will pay no attention to any remarks of counsel made in arguing their objections or any remarks of the court * * * because they have nothing to do with your portion of the case." This admonition was repeated in the charge. (Tr. 742-743).

VI

There Was No Error in the Instructions Much Less Plain Error of the Character Which This Court Should Notice Even Though No Exception Was Taken to the Charge

Appellant challenges (Br. 64-67) the correctness of the instructions for the first time on appeal. Since no exception was taken to the charge (Tr. 758), appellant cannot be heard to complain now unless the error assigned is so plain and prejudicial as to require reversal by this Court in order "to prevent a miscarriage of justice or to preserve the integrity of judicial proceedings". *Herzog* v. *United States,* 235 F. 2d 664, 666 (C.A. 9th), certiorari denied, 352 U.S. 844; Rules 30 and 52, Federal Rules of Criminal Procedure, *supra.*

The jury was instructed, in part, as follows (Tr. 749-751, 753-754), with the language complained of by appellant (Br. 30, 64-67) in italics:

> The question of intent is a matter for you, as jurors, to determine and, as intent is a state of mind and it is not possible to look into a man's mind to see what went on, the only way you have of arriving at the intent of the defendant in this case is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits and determine from all such facts and circumstances what the intent of the defendant was at the times in question. Thus, direct proof of wilful or wrongful intent or knowledge is not necessary. *Intent and knowledge may be inferred from acts* and such inferences may arise from a combination of acts, although each act standing by itself

may seem unimportant. These are questions of fact to be determined from all the circumstances.

* * * * *

On the question of intent to evade income taxes there are certain matters which you may consider as pointing to such intent, if you find that they exist in this case. General illustrations are: keeping a double set of books, making false entries in the books, altering invoices, destruction of books, concealment of assets, covering up sources of income, handling one's affairs to avoid the making of usual records, *and any conduct the likelihood of which would be to mislead or conceal.* These instances are given you simply to illustrate the type of conduct from which you may infer intent to evade taxes. If the tax evasion motive plays any part in such conduct, the offense may be made out even though the conduct I have mentioned might also serve some other purpose.

* * * * *

In the indictment and testimony in this case a number of figures have been mentioned with respect to both the alleged understatements of income and the alleged understatement of taxes. The government is not required to prove the exact figures alleged in the indictment. *It is sufficient* for the government to prove that a substantial amount of Mrs. Summers' income for that year was not shown on her tax return. With respect to the understatement of tax, *it is sufficient* for the government to prove that Mrs. Summers owed a substantial

amount of tax each year in addition to that shown on her return. Mathematical precision in amount is not required. *It is important only* that the return which was filed was false in the particulars alleged and that the defendant thereby had knowledge of such falsity. The gist of the offense in each of these acts is wilful attempt on the part of the defendant to evade and defeat a part of the income tax alleged to be due to the United States. The specific means of evasion alleged is the filing of false returns with intent by so doing to defeat the tax or a portion thereof. The attempt must be wilful and intentional. *If you believe* from the evidence that the returns were incorrect, but that the defendant made them in good faith, she is not guilty of the offense charged. Carelessness or negligence, unaccompanied by bad faith, does not render her guilty. *If you believe* the falsity was wilful and made with fraudulent intent, *you should find the defendant guilty.* If you have reasonable doubt on the subject as it has been defined to you in these instructions, you should find the defendant not guilty.

* * * * *

The point need not be labored that in the context used here the challenged language was not error, much less error of the kind which would warrant invocation of Rule 52(b). In *Norwitt* v. *United States,* 195 F. 2d 127, 132 (C.A. 9), this Court observed that it is "hornbook law that the Government need not adduce direct proof of intent. It may be inferred from the defendant's acts". The challenged language in the second paragraph above quoted was taken verbatim from *Spies* v.

United States, 317 U.S. 492. Appellant's objection to the use in the third paragraph of such phrases as "it is sufficient" and "if you believe" may best be characterized as mere "fly-specking". Compare, *Lurding* v. *United States,* 179 F. 2d 419 (C.A. 6th) which is relied on by appellant.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

CHARLES K. RICE,
Assistant Attorney General.
JOSEPH M. HOWARD,
JOHN J. MCGARVEY,
Attorneys.

BEN PETERSON,
United States Attorney.

MAY, 1957.

APPENDIX

PLAINTIFF'S EXHIBIT NO. 66

Assets:	12-31-49	12-31-50	12-31-51	12-31-52
Cash on Hand	15,000.00	15,000.00	15,000.00	15,000.00
Bank Credits	5,622.60	9,883.95	14,234.40	13,310.75
U. S. Savings Bond	18.75	18.75	18.75	18.75
Loans Receivable	2,000.00	9,000.00	19,750.00	11,300.00
Stocks—Bonds—Leases	8,000.00	8,000.00	8,000.00	8,000.00
Escrow Contracts Receivable	2,383.04	-0-	6,403.97	5,810.66
Twin Falls House	9,000.00	9,000.00	.....	.....
Lee Rooms—Bldg. and Imp.	20,851.67	30,337.37	30,337.37	30,337.37
Lee Rooms—Furn. and Fixtures	3,592.76	5,252.40	5,252.40	5,252.40
Farm and Farm Bldgs	.....	.....	.....	29,010.35
Personal Furniture	3,300.00	3,300.00	3,300.00	5,167.25
Trailer House	.....	1,000.00	1,000.00	.....
Cattle Purchased	.....	.....	.....	5,610.00
Farm Truck	.....	.....	.....	1,500.00
11th Dist. Court Bail Bond	.....	.....	.....	2,500.00
Total Assets at Cost	69,768.82	90,792.47	103,296.89	132,817.53
Less Depreciation	7,591.57	9,045.31	10,543.12	12,813.86
Total Assets Red. by Depr. Reserve	62,177.25	81,747.16	92,753.77	120,003.67
Liabilities:	.....	8,166.02	6,258.05	13,894.62
Net Worth:	62,177.25	73,581.14	86,495.72	106,109.05

Computation of Adjusted Gross Income

Net Worth End of Year	73,581.14	86,495.72	106,109.05
Net Worth Beginning of Year	62,177.25	73,581.14	86,495.72
Increase in Net Worth During Year	11,403.89	12,914.58	19,613.33
Non-Taxable Income	.....	(500.00)	.....
Non-Deductible Expenditures	2,170.32	1,256.46	2,126.00
Adjusted Gross Income	13,574.21	13,671.04	21,739.33

PLAINTIFF'S EXHIBIT NO. 67

Computation of Tax

	1950	1951	1952
Adjusted Gross Income	$13,574.21	$13,671.04	$21,739.33
Less Standard Deductions	1,000.00	1,000.00	1,000.00
Net Income	12,574.21	12,671.04	20,739.33
Less Exemptions (3 x 600)	1,800.00	1,800.00	1,800.00
Taxable Income	10,774.21	10,871.04	18,939.33
Tax Liability	2,654.12	3,035.71	7,490.20
Per Return	92.00	65.73	-0-
Deficiency in Tax	2,562.12	2,969.98	7,490.20

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